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No. 89-869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HENRY HOLT AND COMPANY, INC.,

Petitioner,

vs.

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION

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BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF LEARNED SOCIETIES, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, MODERN LANGUAGE ASSOCIATION OF AMERICA, AND ORGANIZATION OF AMERICAN HISTORIANS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THE INTEREST OF THE ORGANIZATIONS

The American Historical Association (AHA), with headquarters at 400 A Street, S.E., Washington, D.C. 20003, is the oldest and largest national association of historians in the United States, chartered in 1889 by special act of Congress. It has a membership of over 14,000 practicing historians in academic and public life, who engage in research in all fields and in all periods of history.

The Organization of American Historians (OAH), with executive offices at 112 North Bryan Street, Bloomington, Indiana 47401, represents and serves approximately 8,700 individual members and 3,500 institutional members. Founded in 1907, it is the leading professional organization of scholars

involved in the study of the history of the United States.

The American Political Science Association (APSA), with headquarters at 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036, is the leading professional organization for those engaged in the study of politics and government. Founded in 1903, it has a membership of 12,000 individuals and 3,000 institutions.

The Modern Language Association of America (MLA), Ten Astor Place, New York, New York 10003, was founded in 1884 to promote the study and teaching of the modern languages and their literatures. With 27,000 members, it has the largest membership of any organization representing teachers and scholars of the humanities.

The American Council of Learned Societies, with offices at 228 East 45th Street, New York, New York 10017, is a federation of forty-six national scholarly organizations and associations, dedicated to the advancement of humanistic studies of all fields of learning. Organized in 1919 and incorporated in the District of Columbia in 1924, Congress granted it a federal charter in 1982. With the support of government and private funds, it sponsors research, presentations, and publications in all fields of humanistic scholarly endeavor.

The members and beneficiaries of the services of these organizations regularly research, write, and publish articles and books on history, political science, literature, and other scholarly subjects. These works are designed to

expand the boundaries of knowledge both of scholars and of general readers. In the course of their work, the members of the above-named organizations frequently draw upon unpublished sources that receive copyright protection under the Copyright Revision Act of 1976. These scholars quote and paraphrase these unpublished sources, in accordance with the conventions of scholarship and in reliance upon the provisions for fair use under the 1976 law.

The AHA, OAH, APSA, MLA, and many of the member associations of the American Council of Learned Societies also publish the leading scholarly journals in their fields. Unpublished materials are regularly quoted in these journals, in accordance with the conventions of scholarship and the fair-use provisions of the law. On behalf of their members

as authors and themselves as publishers, these associations have a vital interest in seeking review of the decision of the Second Circuit Court of Appeals, which severely limits the circumstances in which unpublished materials can be quoted, seriously impairing the ability of researchers to conform to the canons of modern scholarship.

These scholarly organizations support the petition for certiorari but do not here take up the merits of the case. Petitioner and respondent have consented to the filing of this brief.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The scholarly organizations joining in this brief wish to express their concern over the reasoning of the United

States Court of Appeals for the Second Circuit in the case of Henry Holt and Company, Inc. v. New Era Publications International, ApS, 873 F.2d 576 (2d Cir. 1989).

The Court of Appeals has stated in New Era that unpublished primary source materials "normally enjoy complete protection" from any fair use quotation. 873 F.2d at 583. The Court has further stated that "the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction" forbidding publication. 873 F.2d at 584. These extreme restrictions on the "fair use" of unpublished works are not only inconsistent with the reasoning of this Court in Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985), but totally at odds with the actual prac-

tice of historians, biographers and political scientists.

The canons of scholarly research require responsible biographers, historians and political scientists to draw upon and quote from unpublished primary source materials with the understanding that a limited amount of quotation is consistent with the doctrine of "fair use." If the Copyright Revision Act of 1976 is held to so narrowly restrict the quotation of unpublished but publicly disseminated letters, diaries, journals, speeches, and memoranda, the accuracy, cogency, and persuasiveness of scholarly writing will be greatly diminished, as will be the satisfaction readers derive from its elegance, symmetry, and sense of completeness.

In the earlier case of Salinger v. Random House, Inc. and Ian Hamilton, 811

F.2d 90 (2d Cir.), cert. denied, 108 S. Ct. 213 (1987), the Court of Appeals interpreted the Copyright Revision Act virtually to preclude fair use of unpublished manuscript materials deposited in libraries and archives open to the public. In this case, the court has interpreted the law to preclude almost any fair use of unpublished manuscript materials obtained from United States government agencies by means of requests filed pursuant to the Freedom of Information Act. In these two cases, the Second Circuit has, for all practical purposes, taken the position that "fair use" allows no use of two significant categories of primary source materials upon which scholars have long depended.

To interpret the Copyright Revision Act of 1976 to impose such severe restrictions on the fair use of unpub-

lished materials suggests that in passing the Act Congress intended radically to restrict the customary practice of American scholarship. Neither the legislative record nor the Supreme Court's decision in Harper & Row warrants such an extreme conclusion. If sustained, such an interpretation will disrupt and discourage important scholarly projects, many of which have received the support of the government itself through the National Historic Publications and Records Commission, the National Endowment for the Humanities, and other agencies mandated by Congress to support scholarly activity, including research and publication of unpublished materials.

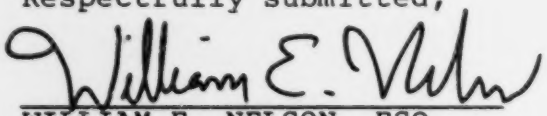
CONCLUSION

We believe that the scholarly community will join us in urging that the Copyright Revision Act be interpreted as

Congress intended, to sustain the legally and morally responsible "fair use" scholars have traditionally made of unpublished primary source materials. The issue is one of great legal and practical importance. For the foregoing reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
December 19, 1989

Respectfully submitted,



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